REA LAW JOURNAL

DEPARTMENT OF AGRICULTURE — RURAL ELECTRIFICATION ADMINISTRATION

Vol. III. No. 1 — January, 1941 — Page 1

LEGALITY OF ATTENDANCE PRIZE CONTESTS

How to get members to attend the annual meeting has caused "headaches" for the officers and directors of many a cooperative. Various schemes have been tried but one of the most successful and at the same time most simple and inexpensive is the so-called "attendance prize contest". Sums of money or other things of value, donated to the association by local merchants and business men for advertising purposes, are awarded as prizes among the members in attendance at the meeting, the winners being determined by lot or by chance, usually by the familiar device of drawing numbers. Each member in attendance receives a chance in the drawing which costs him nothing other than the act of attendance.

Questions have been raised from time to time concerning the legality of this device under state laws relating to lotteries, gift enterprises and similar schemes. The necessity of announcing the contest through the mails also raises a question concerning its legality under federal laws regulating the use of the mails.

It is universally agreed that the three essential elements of a lottery are prize, chance and consideration. People v. Fallon, 152 N.Y. 1, 46 N.E. 302 (1897); People v. Reilly, 50 Mich. 384, 15 N.W. 520 (1883); Equitable Loan & Insurance Co. v. Waring, 117 Ga. 599, 44 S.E. 320 (1903); State v. Hundling, 220 Iowa 1369, 264 N.W. 608 (1936). All three elements must be present. Chance alone or chance coupled with consideration alone will not make a lottery. Affiliated Enterprise v. Truber, 86 Fed. (2d) 959 (C.C.A. 1st, 1936); United-Detroit Theatres Corp. v. Colonial Theatrical Enterprise, 280 Mich. 425, 273 N.W. 756 (1937); People v. Miller, 271 N.Y. 44, 2 N.E. (2d) 38 (1936). A lottery is a "chance for a prize for a price." Com. v. Wall, 295 Mass. 70, 3 N.E.(2d) 28 (1936).

In the attendance prize contest we admittedly have both prize and chance. Is the third element, consideration, present?

There is a great difference of opinion concerning the nature of the consideration that the participant must give in order to support a lottery charge. Most of the earlier decisions required an actual payment of money or the giving of something of value for the right to participate, and refused to find a lottery in a scheme which was a mere gratuitous distribution of property, even though made with the anticipation of receiving a benefit. Cross v. People, 10 Colo. 32, 32 Pac. 821 (1893); Yellowstone Kit v. State, 88 Ala. 196, 7 So. 338 (1890); People v. Mail and Express Co., 179 N.Y. Supp. 640 (1919). The more recent decisions, most of which involve the so-called theatre "bank-nite" scheme, show an almost even split of authority, some following the earlier cases and others finding the requisite consideration where the participant in the alleged lottery was not required to pay money or other thing of value as a prerequisite to participation. These decisions cannot be harmonized or placed in distinct lines because they arose under different types of actions, under statutes of different language or in the absence of statute, or

simply reached diametrically opposed results on substantially identical facts.

They do fall into two general classes. Those of one class hold that the "bank-nite" scheme is not a lottery where the purchase of a ticket to the theatre is not a prerequisite to participation in the drawing. State v. Eames, 87 N.H. 477, 183 Atl. 590 (1936) and Roswell v. Jones, 41 N.M. 258, 67 P.(2d) 286 (1937) are representative of this class. The cases in the other class hold that the scheme is a lottery, even though chances are distributed to the general public and not exclusively to the patrons of the theatre. They find the requisite consideration in the fact that the revenues of the theatre are increased by the increased attendance induced by the drawing /State v. Fox Kansas Theatre Corp., 144 Kan. 687, 62 P. (2d) 929 (1936)/, or that a consideration has been paid collectively by those who purchased tickets and those who received free chances /Barker v. State, 56 Ga. App. 705, 193 S.E. 605 (1937)/ or that those who did purchase tickets and obtain admission to the theatre did in fact have a better chance of winning. Iris Amusement Corp. v. Kelly, 366 Ill. 256, 8 N.E. (2d) 648 (1937).

For the purposes of this article, it is unnecessary to decide which of these two classes of decision is best reasoned or best supported by authority. However, they are significant in three particulars. First, all of the decisions in both classes apparently concede that if the chance is genuinely free, the requisite consideration is not present. Thus in Com. v. Wall supra, a case of the second class, the court in declaring a bank-nite scheme to be a lottery, distinguished the result in State v. Hundling, supra, and State v. Eames, supra, by pointing out at page 30 that "fair participation" was a "reality" according to the courts' finding in those cases, whereas the jury could have found differently in the case under consideration. And at page 29 the court conceded that "one may give away his money by chance and if the winner pays no price, there is no lottery". (Emphasis added)

Second, none of the decisions in either class holds that mere attendance at a drawing is in itself sufficient consideration to support a lottery. In fact, research reveals but one case which appears to so hold. That is the case of Maughs v. Potter, 157 Va. 415, 161 S.E. 242 (1931) which involved a drawing for an automobile offered to attract at an auction sale, each person in attendance receiving a free chance. Even this case might be explained on the ground that while people did not have to bid at the auction to be eligible to receive the automobile, it was reasonably probable that this would be the case, rather than on the ground that mere attendance is sufficient consideration to support a lottery charge. Giving it the latter interpretation, the case has been severely criticized in 80 U. of Pa. L. Rev. 844 and in 18 Va. L. Rev. 465. The Virginia Law Review commentator stated that "the authorities cited in the decision appear to contradict rather than support it."

Third, all of the decisions in both classes agree that the root of the evil against which the lottery laws are directed is the encouragement of the gambling spirit. In other words, the theory behind such laws is that people should be protected against dissipating their money by gambling against odds which are not fully appreciated.

With the foregoing points in mind let us examine the attendance prize contest under consideration. It is clear that free participation is a reality. The member neither contributes toward the prize nor pays admission to the meeting. There is no indirect consideration because the revenues of the association are in no way increased by the increased attendance which may be induced by the drawing. Only the act of attendance is required of the member in return for the right to participate in the drawing and, as we have seen, it is only in the State of Virginia that mere attendance is sufficient to support a lottery charge in the case of a commercial enterprise. Participation then being genuinely free, it is equally clear that

REA LAW JOURNAL

A review of that portion of the law important and interesting to attorneys working in the field of rural electrification.

Published Monthly

The Journal is informational only and should in no wise be interpreted as expressing the views of the Rural Electrification Administration or any division thereof.

Address suggestions and contributions to the Editorial Office, REA, Longfellow Building, Washington, D. C.

there is no encouragement of the gambling spirit in the accepted sense.

In view of the foregoing, it is concluded that in most jurisdictions, Virginia possibly excepted, a cooperative may hold an attendance prize contest without risk of violating penal statutes directed against lotteries, gift enterprises and similar schemes. In Virginia or any other jurisdiction which may later follow the Virginia rule or show a tendency to hold such contests illegal, even though consideration is not present in some substantial form, the cooperative's attorney should consider the decisions of the courts of his state relative to contests where the prize is determined on the basis of skill or learning. If skill or learning and not chance is made the dominant factor, such contests are generally held legal.

The cases arising under Section 213 of the United States Criminal Code (18 U.S. C.A. 336) which prohibits the mailing of any matter pertaining to lotteries, gift enterprises and similar schemes, hold that there is no violation if the scheme is not substantially a gambling scheme or in some degree fraudulent or illegitimate. Public Clearing House v. Coyne, 24 S.C. 789, 194 U.S. 497, 48 L. Ed. 1092 (1904). They follow the reasoning of those cases discussed above which definitely require that the participant part with a money consideration for his chance in the drawing. Post Publishing Co. v. Murray, 230 Fed. 773 (C.C.A. 1916).

It is therefore concluded that a cooperative may announce its intention to hold an attendance prize contest without violating the use of the mails provision.

Sanford M. Stoddard
Assistant Counsel

RECENT CASES

Contracts - Authority of Highway Commission to exact charge under contract assigned to it for maintenance of electric transmission lines

Defendant's predecessor entered into a contract with a bridge company, the then owner and operator of a bridge which spans the Missouri River, under which contract defendant's predecessor was given the right to attach and maintain upon the bridge its transmission lines and appurtenances at a yearly rental of $800. Subsequently, by virtue of an agreement which need not be described here, the bridge was made a part of the state highway system, and the interest of the bridge company in the contract between it and defendant's predecessor was assigned to the plaintiff, State Highway Commission of Missouri. After making a number of yearly payments under the contract, defendant stopped and refused to continue, whereupon this action was brought by the Highway Commission to collect payments due

Plaintiff conceded that it lacked express authority to exact the charge in question, but contended that the authority was to be implied from the broad powers given to it to supervise the construction and maintenance of the state highway

system. Defendant demurred and plaintiff appealed from a judgment dismissing the case. Held, judgment sustained. State ex rel. State Highway Commission v. Union Electric Co. of Missouri, 142 S.W.(2d) 1099 (Mo. 1940).

The court examined the statute having to do with the function of the Commission with respect to the lines and equipment of utility companies upon public highways, and found that although the Commission was given control over the matter of location and relocation of lines with a view to public travel and the construction and maintenance of the highway, it was expressly denied the right to exclude such lines altogether. The theory being "that the public benefit to be derived from the promotion of the services rendered by public utilities warrants the granting to them of the privilege of placing their lines upon the highways, and thereby serves to take such grants outside the class of grants prohibited by the Constitution." From this the court reasoned that the Commission had neither express nor implied power to exact a charge from public utilities which use the public highway as the location of their lines.

In conclusion the court said, "when the bridge in question became a part of the state highway system, defendant immediately acquired the right to maintain its lines upon the bridge, and this wholly independent of any right previously existing under the contract which its predecessor had entered into with the original owner of the bridge. The public benefit presumed to follow is the sole consideration or compensation for the privilege thus accorded it; plaintiff lacks all power to exact a charge for the exercise of the privilege or to compensate for any increased cost in the maintenance of the bridge; and lacking such power, it necessarily has no authority to enforce the contract assigned to it at the time the transfer was accomplished."

- - - - - - - - - -

Negligence - Res ipsa loquitur, judicial notice of certain physical facts

Plaintiff was an electrician engaged in wiring and inspecting the wiring in a community hut. He tesitifed that he took hold of a conduit containing electric wires leading from a switch, and thereupon received severe electric burns. Plaintiff relied on the doctrine of res ipsa loquitur to prove that defendant was negligent in maintaining a transformer. The transformer fed electricity into the hut after first breaking it down from a primary wire carrying 2300 volts. Plaintiff claimed that the transformer was defective, that it did not step down the electricity, that the full 2300 volts passed into the building and into the switch causing an arc of electricity over the points of the switch. Defendant introduced testimony to the effect that the accident was caused by defective wiring inside the hut, with which it had nothing to do, and that the transformer was a good one, of standard make, and undamaged and in use after the accident. From a judgment for plaintiff entered upon a jury verdict, defendant appealed. Held, judgment reversed. Arkansas-Mo. Power Corp. v. Powell, 139 S.W.(2d) 383 (Ark. 1940)

Res ipsa loquitur is not applicable to prove that 2300 volts entered the building and the switch. The points of the switch were .2 inches apart and such a voltage, as a matter of physical fact of which the court took judicial notice, could not jump across .2 of an inch. This, combined with defendant's testimony as to the newness of the switch, its standard make, and its use after the accident, made the doctrine of res ipsa loquitur inapplicable.

- - - - - - - - - -

Public Utilities - Jurisdiction of the Public Utilities Commission to modify a rate ordinance

The East Ohio Gas Co. filed a complaint with the Public Utilities Commission of Ohio against an ordinance passed by the

City of Cleveland regulating the rates to be charged by the gas company. From the findings and orders of the Commission, both parties appealed to the Supreme Court where it was argued by the City of Cleveland that section 614-46, General Code, which authorized the Public Utilities Commission to fix and determine a just and reasonable rate and order the same substituted for the rate fixed by an ordinance was unconstitutional as applied to the facts of this case. Held, order affirmed. East Ohio Gas Co. v. Public Utilities Commission, 28 N.E.(2d) 599 (Ohio, 1940)

The court stated:

"The provisions of Section 4, Article XVIII, of the state Constitution, confer authority upon municipalities to contract with a public utility for its product or service. Such contracts are entered into by the passage of an ordinance fixing the rate and terms for such product and service for a specified period and the filing of a written acceptance thereof by the company. A contract so entered into is binding upon both parties and is not subject to review by the Public Utilities Commission. It does not appear, however, in this instance that there is any existing contract between the city of Cleveland and the utility fixing the rate and terms for product or service. In the absence of such contract, the Public Utilities Commission is authorized by Section 614-46, General Code, upon hearing upon appeal to fix and determine the just and reasonable rate and order the same substituted for the rate fixed by the ordinance, or it may find and declare the rate so fixed by the ordinance to be just and reasonable and ratify and confirm the same."

- - - - - - - - - - -

Taxation - Power of legislature to exempt from taxation property of an irrigation district

In a suit by an irrigation district to quiet title to land acquired by it through sale for delinquent taxes, the State of Arizona answered as defendant claiming a tax lien for county and state taxes. The irrigation district demurred on the ground that said property was exempt from taxation by virtue of section 3373, Revised Code, which designated the property so acquired by an irrigation district as "public property", and section 3424, Id., which proclaimed an irrigation district to be a municipal corporation and entitled to all exemptions accorded public and municipal corporations. Held, that the claimed exemption be denied. State, et al v. Yuma Irr. Dist., 99 P.(2d) 704 (Ariz. 1940).

The court ruled that the statutes relied upon by the defendant were unconstitutional insofar as they attempted to exempt from taxation property owned by the irrigation district. Section 2, Article IX, of the State Constitution expressly exempts from taxation "all federal, state, county and municipal property". The same section delegates power to the legislature to grant exemption in case of property belonging to "educational, charitable and religious associations or institutions not used or held for profit. * * *" The court points out that the legislature by sections 3373 and 3424 attempted to give the irrigation district immunity from taxation by defining them as municipal corporations. After demonstrating the fundamental difference between a municipal corporation and irrigation district the court said:

"The legislature can exempt only that property the constitution provides it may exempt by law. It cannot do indirectly what it cannot do directly. It cannot, by defining an irrigation district as a municipal corporation, secure to it the exemption from taxation allowed municipal corporations under the constitution."

LEGAL MEMORANDA RECEIVED IN DECEMBER

Civil Aeronautics Administration as a member of REA Cooperative Associations - Letter from Acting Administrator of C.A.A.

Workmen's Compensation Coverage of County Engineer - opinion of Attorney General of Oklahoma

A-404 Conditions precedent to dissolution of Public Utility as required by statute (Kentucky)

A-406 Applicability of Workmen's Compensation Acts to REA project engineers (Oklahoma

A-407 Implied waiver of common law remedies under Workmen's Compensation Acts (Texas)

A-408 Amendment of Alabama Workmen's Compensation Act

A-409 Pledge of assets by bank to secure private deposits

A-418 Postal employees serving as directors of REA cooperatives

A-420 Priority of lien of purchase - money mortgage over after-acquired property clause (Miss.)